IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 11, 2004

STATE OF TENNESSEE v. WILLIAM MARTIN FREY, JR.

Direct Appeal from the Criminal Court for Davidson County
No. 98-C-2059 Walter Kurtz, Judge

No. M2003-01996-CCA-R3-CD - Filed October 6, 2004

Following a jury trial, the Defendant was convicted of five burglary, three theft and five drug offenses. The trial court sentenced the Defendant, William M. Frey, Jr., to 50 years as a persistent offender. The Defendant argues six issues on appeal: (1) there was insufficient evidence to find the Defendant guilty beyond a reasonable doubt, (2) the trial court erred by not severing the Defendant's charges at trial, (3) the trial court erred by admitting prior statements made by the Defendant pertaining to his criminal record, (4) the trial court erred in admitting at trial the Defendant's statements concerning his drug use, (5) the trial court erred by failing to adequately consider the Defendant's diminished mental capacity as a mitigating factor during sentencing, and (6) the trial court erred in ordering the Defendant's sentences to be served consecutively. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Leann Smith, Nashville, Tennessee, for the Appellant, William Martin Frey, Jr.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

We must note at the outset that this case has followed a troubling procedural path to reach this Court on direct appeal. The Defendant's appeal as of right was initially delayed nearly three years because the Defendant's attorney never pursued an appeal even though his incarcerated client assumed he had. A post-conviction proceeding was eventually initiated, which resulted in an order granting a delayed appeal. Although the State argues that this appeal should be dismissed because notice of appeal was not timely filed, we may waive the timely filing of notice of appeal and have

done so. In addition, the appellant's brief was not timely filed, but this Court granted a motion to accept the late-filed brief. Finally, for reasons stated in the opinion, several issues presented on appeal must be deemed waived for failure to comply with procedural rules.

FACTUAL BACKGROUND

The Defendant's thirteen convictions stem from six separate incidents that occurred in and around Nashville between the months of July and December of 1997. The first incident occurred during the early morning hours of July 17, 1997, in the home of Ms. Ann Graham. At the time of the incident Ms. Graham was in the process of refurbishing and settling in to her recently purchased home. The Defendant was her neighbor, whom she had seen on several prior occasions since purchasing the house. On the night of the incident, Ms. Graham went to bed quite late. As was her habit, she placed her purse on a shelf in the kitchen and her jewelry on a bedroom night stand before going to bed. She awoke from her sleep to sounds of movement in her home. She opened her bedroom door to investigate and was startled to see the Defendant standing directly in front of her holding her purse. The Defendant stated he was trying to protect her from an intruder he saw enter her house, then dropped the purse and walked out the front door. A small amount of cash, some silver and jewelry were discovered missing. The Defendant was convicted of aggravated burglary and theft in connection with this incident.

The second incident occurred shortly after 11:00 p.m. on November 16, 1997. Officer Watson of the Nashville Police Department saw a black pickup truck with several people standing around it parked on the side of the street he was patrolling. As he approached, the truck drove away and sped off. Officer Watson noticed the pickup did not have functioning taillights, but he was unable to catch up with the vehicle at that time. Not long thereafter Officer Watson again passed the same pickup, still without taillights, but this time was able to pull the pickup over. As he was making the stop, Officer Watson saw two people in the vehicle, and also observed a small black container thrown out the passenger side window, although he could not determine which person threw the container. Upon approaching the pickup Officer Watson observed a large amount of cash in the cab. The Defendant, who was the driver of the pickup, consented to a search. In addition to the cash, Officer Watson discovered a white powdery substance and small yellowish bits of rock substance that appeared to be crack cocaine on the center console.

Officer Watson retrieved the container he had observed thrown from the pickup. The 35mm film canister contained seven large rocks and several smaller pieces of a yellow substance that also appeared to be crack cocaine. Subsequent laboratory tests determined it was indeed 1.8 grams of cocaine. The Defendant and his passenger were arrested. The Defendant was convicted of possession with intent to sell or deliver over .5 grams of cocaine.

The third incident occurred on December 4, 1997, around 7:00 in the evening when the same black pickup was witnessed by Officers Woods and Robinson traveling down an alley with no lights on. The officers stopped the truck, again driven by the Defendant, who was accompanied by a passenger. During the stop, the officers observed what they believed to be crack cocaine on the center console of the pickup. The officers arrested the Defendant and his passenger. During the

search incident to arrest, additional drug paraphernalia in the form of a crack pipe was found on the Defendant. Tests later concluded that the substance observed in the center console of the pickup was cocaine. The Defendant was convicted of possession of cocaine and possession of drug paraphernalia in connection with this incident.

The fourth incident occurred less than a week later on the afternoon of December 10, 1997. Mr. William Vanderpool noticed a burgundy Corvette parked on a trail in the woods behind his house in the Hermitage/Donnelson area. Mr. Vanderpool decided to investigate. As he approached, he saw a man walking out of the woods toward the car. The man came from the direction of his neighbor's, the Vonhopffgartens. Mr. Vanderpool asked the man what he was doing, to which the man replied he was taking a "nature walk." Mr. Vanderpool informed the man he was on private property and must leave. The man left, but Mr. Vanderpool was suspicious and wrote down the license number of the Corvette.

Mr. Vanderpool decided to check his property and discovered a basket filled with household electronic items next to his shed, which was directly behind the Vonhopffgarten's house. Later that same evening when Mrs. Vonhopffgarten arrived home she discovered her basement door was kicked in and her house burglarized. Various electronic equipment items and jewelry were taken from the Vonhopffgarten home. The items found by Mr. Vanderpool were later determined to be part of the property taken from the Vonhopffgarten residence. Mr. Vanderpool could identify the man he confronted only as a white male in his mid-thirties weighing between 150 and 170 pounds. At trial, Mr. Vanderpool could not positively identify the man he saw, and admitted he did not witness any stolen property in the Corvette or in the hands of the man he confronted. It was later determined that the Corvette belonged to Ms. Barbara Bottoms, a friend of the Defendant. The Defendant was convicted of aggravated burglary and theft in connection with this incident.

The fifth incident occurred four days later, the morning of December 14, 1997, in the parking lot of the International House of Pancakes (IHOP) near Harding Mall. Mr. Ross Alderman, an Attorney with the Public Defender's Office, was leaving IHOP and walking toward his car when he heard the sound of breaking glass. He looked in the direction of the sound and saw a man duck behind some parked cars. He walked directly to the place where he observed the suspicious activity and discovered the Defendant sitting in a parked burgundy Corvette. The Defendant was the only person in the area at the time. Mr. Alderman confronted the Defendant who denied breaking into the Corvette, produced the keys and drove off. However, after the Defendant drove off, Mr. Alderman noticed that the car immediately next to where the Corvette had been parked had a broken window.

Mr. Alderman wrote down the licence plate number of the Corvette, which was later determined to be the same car involved in two other burglary incidents and owned by the Defendant's friend, Ms. Barbara Bottoms. Mr. Alderman identified the Defendant in a photographic lineup as the man he saw drive off in the Corvette, but could not be sure it was the same man he saw duck behind the cars. The owner of the automobile with the broken window, Ms. Carol Swearingen, testified that items of clothing and cash were stolen from her car. The Defendant was indicted for

one count of burglary of an automobile and one count of theft, but was convicted only on the burglary charge.

The sixth and final incident relevant to the Defendant's convictions occurred in the early morning hours of December 19, 1997. Mr. Jerry Dale, owner of the Crystal Clean carpet business, received a call sometime after 2:00 a.m. from his security system monitoring company reporting a break-in at his business. Upon inspection, Mr. Dale discovered that his office and one of his work vans had been burglarized and several items stolen. About this time Officer Weaver was patrolling in the general area of the Crystal Clean burglary when he received a call about an abandoned vehicle in an alley. Officer Weaver found the vehicle, a burgundy Corvette, and walked up to it. Inside the Corvette Officer Weaver observed a hand buffer, cell phone, ceramic heater and other tools. The Defendant approached Officer Weaver and claimed that the items in the car belonged to him and his girlfriend. Upon further questioning, the Defendant stated that he just bought the items from a black man in front of a Krispy Kreme doughnut shop. Officer Weaver knew about the Crystal Clean burglary through the police radio, and informed the officers investigating the burglary of his find. Mr. Dale was driven by the police to the alley where the Corvette was parked and identified the items found in the car as his property. The Defendant was arrested for burglary, and a search incident to the arrest turned up what appeared to be marijuana, and drug paraphernalia in the vehicle. The substance later tested positive for marijuana. The Defendant was convicted of burglary of a building, burglary of an automobile, possession of marijuana and possession of drug paraphernalia in connection with this incident.

All fourteen counts from the six separate incidents were tried together at one trial held over two days, April 26 and 27, 1999. At the conclusion of the trial, the jury returned a verdict of guilty on all but one theft charge, resulting in convictions of two counts of aggravated burglary, two counts of burglary of an automobile, one count of burglary of a building, three counts of theft, four counts of simple possession of a controlled substance or drug paraphernalia, and one count of possession with intent to sell. A sentencing hearing was held on August 19, 1999, and the Defendant was sentenced as a persistent offender to 50 years.

Defendant wrote a pro se letter to the Tennessee Appellate Court Clerk's office in February of 2002, inquiring about the status of his appeal. The clerk's office informed him that a Notice of Appeal was never filed for his case. The Defendant filed a petition for post-conviction relief on May 6, 2002, alleging, inter alia, ineffective assistance of counsel. Defendant claimed his attorney "led [him] to think" his direct appeal as of right had been timely filed nearly three years prior. The Defendant was appointed new counsel, and several amended petitions for post-conviction relief were filed. A post-conviction hearing was conducted on September 26, 2002, and the court ordered that, in the interest of justice, the Defendant should be allowed to file a delayed motion for a new trial "pursuant to Tenn. Code Ann. § 40-32-213(a)(3)."[1] The Defendant timely filed a Motion for a New

[1]The order, dated September 26, 2002, apparently contained a typographical error in its reference to the statute. We note that the trial court did have proper authority to grant a delayed Motion for New Trial pursuant to Tennessee (continued...)

Trial and two amended motions, the last of which preserved all six issues now on appeal. A hearing on the Motion for a New Trial was held on July 1, 2003 and the motion was denied. The Defendant filed a Notice of Appeal on August 4, 2003.

ANALYSIS

I. Notice of Appeal Filed Late

The State mentions in a footnote that the Defendant has failed to file a timely Notice of Appeal as required by the Tennessee Rules of Appellate Procedure. The State acknowledges that this Court has the discretion to waive the requirement of timely filing in the interest of justice, but nevertheless asserts that because the Defendant has failed to even address the issue we should dismiss the appeal. We first point out that a proper request for dismissal of an appeal is not made through a footnote in the Appellee's Brief.

In order to be timely filed, a Notice of Appeal must be filed within 30 days of the entry of the trial court judgment. See also Tenn. R. App. P. 4(a).[2] However, "[n]otwithstanding any other provision of law or rule of court to the contrary, in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interests of justice." Tenn. Code Ann. § 27-1-123; see also Tenn. R. App. P. 4(a). The proper procedure would have been for the appellant to file a motion with this Court requesting the timely filing of a notice of appeal be waived in the interest of justice. State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). In any event, once the State has requested that the appeal be dismissed, it would behoove the Appellant to respond and request a waiver. Nonetheless, it is the opinion of this Court that the notice of appeal requirement should be waived in the interest of justice. We now so hold.

II. Insufficient Evidence

The Defendant's first issue on appeal is whether there was sufficient evidence for any reasonable trier of fact to find beyond a reasonable doubt that the Defendant was guilty of the thirteen crimes for which he was convicted. The Defendant maintains that while the evidence presented at trial placed the Defendant near the scene of several crimes, such evidence was circumstantial and fails to support the burglary and theft convictions beyond a reasonable doubt. Defendant further argues that the State failed to prove beyond a reasonable doubt that it was the Defendant who possessed the drugs that led to several of his drug convictions. We disagree.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the

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[1](...continued)
Code Annotated § 40-30-113(a)(3).

[2]"In an appeal as of right to the. . .Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." Tenn. R. App. P. 4(a).

evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

As a preliminary matter we must note that it is unclear from the Defendant's brief precisely which of the thirteen convictions he wishes to challenge on the grounds of insufficient evidence. The Defendant concludes his analysis of this issue by stating "the weight of evidence in this case is clearly insufficient to support the jury's verdicts as to counts three, six, eight, and thirteen," but the brief only addresses evidence pertaining to the Defendant's conviction on counts three and eight. Additionally, the Defendant did make an argument for insufficient evidence pertaining to the first incident which led to his conviction of aggravated burglary under count one, even though the Defendant never expressly alleged in his appellate brief that his conviction under count one should be reversed. We further note that the Defendant also makes the umbrella request that his "convictions. . .be reversed and the case dismissed," which could plausibly be interpreted as an argument that all thirteen convictions fail due to insufficient evidence.

When bringing an appeal before this Court, the Defendant is required to make appropriate references to the record in his brief and cite to relevant authority. See Tenn. Ct. Crim. App. R. 10(b). Failure to do so will ordinarily constitute a waiver of the issue. See State v. Schaller, 975 S.W.2d 313, 318 (Tenn. Crim. App. 1997). Accordingly, we will address the Defendant's insufficiency of evidence claim as to the convictions of counts one, three and eight, and consider any sufficiency of evidence claims as to the other ten counts lacking reference to the record to be waived.

A. Count One: Aggravated Burglary

The Defendant was convicted of aggravated burglary in count one. Tennessee statutes define burglary, in relevant part, as follows:

> (a) A person commits burglary who, without the effective consent of the property owner:
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with the intent to commit a felony, theft or assault; . . .
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402. Aggravated Burglary is the burglary of a habitation. See Tenn. Code Ann. § 39-14-403.

The Defendant claims there was insufficient proof that he intended to enter the home of Ms. Graham with the intent to commit theft therein. The Defendant further argues the evidence against him is largely circumstantial and fails to meet the intent requirement of the aggravated burglary statute. We disagree.

It is well established that "[i]ntent is rarely proven by direct evidence, and the trier of fact may deduce or infer intent from the character and nature of the offense and the circumstances surrounding the offense." State v. Jones, No. E2003-01565-CCA-R3-CD, 2004 WL 1541309, at *8, (Tenn. Crim. App., Knoxville, July 9, 2004) (citing State v. Inlow, 52 S.W.3d 101,104-105 (Tenn. Crim. App. 2000); see also State v. Lowery, 667 S.W.2d 52, 57 (Tenn. 1984). Furthermore, circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). However, the circumstantial evidence must be consistent with the guilt of the accused, inconsistent with innocence, and must exclude every other reasonable theory except that of guilt. Tharpe, 726 S.W.2d at 900. Moreover, if a conviction is based entirely on circumstantial evidence, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." State v. Reid, 91 S.W.3d 247, 277 (Tenn. 2002) (quoting State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993)). Deference clearly lies with the jury, as the weight of circumstantial evidence is a matter for the jury to determine. State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985). Additionally, whether all other reasonable theories have been excluded by the evidence is also a question of fact for the jury. Pruitt v. State, 460 S.W.2d 385, 390-91 (Tenn. Crim. App. 1970).

The evidence at trial established that in the early morning hours of July 18, 1997, Ms. Graham was awoken by the sounds of movement in her home. Ms. Graham found the Defendant in her house, holding her purse. The Defendant did not have consent to enter Ms. Graham's house. Immediately after the Defendant left the house Ms. Graham discovered that cash, silver and jewelry were missing. The Defendant stated that he entered the house to protect Ms. Greene from an intruder, but no corroborating evidence for this claim was ever admitted to the record. In short, the Defendant was caught "red-handed" by the victim of the burglary in the victim's own house, and has presented no reasonable alternative theory other than guilt. We conclude that the proof pertaining to this charge, viewed in the light most favorable to the State, was sufficient to convict the Defendant of aggravated burglary. This issue has no merit.

B. Count Eight: Burglary of an Automobile.

The Defendant's argument that his burglary of an automobile conviction should be reversed due to insufficient evidence also fails. The Defendant claims there was no proof that he was the person who committed the burglary of the automobile in the International House of Pancakes Restaurant parking lot. The Defendant stresses the State's failure to produce a witness to the actual crime, and lack of scientific evidence such as fingerprints linking the Defendant to the car burglary. The Defendant argues that the evidence presented at trial was wholly circumstantial and insufficient to support a guilty conviction. We disagree.

The evidence on record established that while walking to his own car in the IHOP parking lot, Mr. Alderman heard the sound of glass breaking and saw a man quickly duck behind a parked car. He immediately walked to where he saw the man hide and discovered the Defendant, sitting in a parked burgundy Corvette. Mr. Alderman confronted the Defendant, who quickly drove away. Mr. Alderman observed that a window of the car directly facing where the Corvette had been parked was broken. The owner of the car with the broken window testified that personal items had been stolen. Mr. Alderman was able to write down the licence plate number of the Corvette. Mr. Alderman identified the Defendant in a photographic line up as the man he saw drive off in the Corvette. Mr. Alderman testified that at the time he heard the glass break and confronted the Defendant, no one else was in the parking lot area.

Viewed in the light most favorable to the State, the evidence at trial supports the jury conviction for burglary of an automobile. No scientific evidence was presented, and the eye-witness testimony only places the Defendant near the location of the crime, not actually committing it. However, the circumstantial evidence on record supports the jury's conviction. Mr. Alderman and the Defendant were the only persons in the vicinity when the crime took place. Mr. Alderman saw the Defendant sitting within feet of the broken window. When confronted, the Defendant fled the scene of the crime in the same car ultimately linked to two other burglaries in less than a month. The Defendant failed to present any evidence in the record that would support an alternative theory to his presence at the scene of the crime other than guilt. Taken together, the circumstances were sufficient for a rational jury to find the Defendant guilty of burglary of an automobile. This issue has no merit.

C. Count Three: Drug Possession with Intent To Sell

The Defendant was convicted in count three of possession with intent to sell or deliver a controlled substance. The Defendant argues that the evidence is insufficient to support the conclusion that the Defendant was in possession of the film canister filled with crack cocaine and thrown out the passenger's side window of the Defendant's pickup while the Defendant was on the driver's side. We disagree. It is unclear whether the Defendant challenges the jury's conclusion that, if indeed the Defendant was in possession of the controlled substance, he intended it for sale as opposed to simple possession. However, we will address this issue as well.

Pursuant to the Tennessee criminal statutes, "[i]t is an offense for a defendant to knowingly: . . . (4) Possess a controlled substance with intent to manufacture, deliver or sell such controlled

substance." Tenn. Code Ann. § 39-17-417(a)(4). Tennessee courts have recognized that possession may be actual or constructive. State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) (citing State v. Patterson 966 S.W.2d 435, 444-45 (Tenn. Crim. App. 1997)). The effect of finding constructive possession is essentially "the ability to reduce an object to actual possession." State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Constructive possession occurs when a person has "the power and intention at a given time to exercise dominion and control over [the drugs] either directly or through others." Shaw, 37 S.W.3d at 903 (quoting Patterson, 966 S.W.2d at 445). However, "[o]ne's mere presence in an area where drugs are discovered, or one's mere association with a person who is in possession of drugs, is not alone sufficient to support a finding of constructive possession." Shaw, 37 S.W.3d at 903 (citing Patterson, 966 S.W.2d at 445; Cooper, 736 S.W.2d at 129); see also State v. Bigsby, 40 S.W.3d 87, 90 (Tenn. Crim. App. 2000).

In determining whether the possession of a controlled substance was intended for sale, this court looks to the entirety of the circumstances surrounding the arrest. We have previously determined that a large amount of cash found in conjunction with cocaine may be sufficient evidence of intent to sell. See State v. Logan, 973 S.W.2d 279, 281 (Tenn. Crim. App. 1998). We have also found that possession of a large amount of drugs and the absence of any drug paraphernalia or apparatus indicative of personal use may also be sufficient to support a conviction for possession of a controlled substance with intent to sell or deliver. See State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) (holding that 1.7 grams of crack cocaine was a sufficiently large amount to infer intent to sell). Moreover, the law expressly allows a jury to infer intent to sell based on the amount of the controlled substance possessed. See Tenn. Code Ann. § 39-17-419.[3]

In our view, the evidence presented at trial was sufficient to support a conviction for possession of a controlled substance with intent to deliver. Officer Watson observed the Defendant's black pickup parked on the side of the street with several people standing around it at 11:00 at night. When he approached, the Defendant sped off. As Officer Watson later pulled over the pickup, he witnessed a small black container thrown out the passenger side window, which Officer Watson retrieved a few feet from the pickup. The contents of this container were later shown to be 1.8 grams of crack cocaine. Officer Watson also found a stack of cash in the cab but no drug paraphernalia. The Defendant was the driver of the pickup.

The jury, as the trier of fact, could well determine that the Defendant had constructive possession of the drugs based on the fact that the Defendant not only occupied the small pickup cab where the controlled substance originated, but also exercised control over the vehicle as the driver. See State v. Yarbro, 618 S.W.2d 521, 525 (Tenn. Crim. App. 1981) (holding the driver of an automobile was in constructive possession of drugs found under the dashboard even though a third party admitted to placing the drugs there without the driver's knowledge). It matters not that the arresting officer saw the drugs thrown from the pickup as opposed to finding them inside the pickup.

[3] "It may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." Tenn. Code Ann. § 39-17-419.

See State v. Hill, 875 S.W.2d 278, 285 (Tenn. Crim. App. 1993) (evidence was sufficient to convict of possession with intent to sell where defendant was observed throwing something while running from the scene of the crime, and the retrieved objects included a paper bag containing crack cocaine). Additionally, the arresting officer found a stack of cash, "mostly twenties," and crack cocaine, but no drug paraphernalia or individual drug-use apparatus, circumstances which clearly would allow a reasonable jury to infer intent to sell. We conclude that the Defendant has failed to demonstrate that the jury was presented insufficient evidence at trial for any rational trier of fact to find beyond a reasonable doubt that the Defendant was guilty of possession of a controlled substance with intent to sell or deliver. Thus, this issue has no merit.

III. Severing Charges

The Defendant next asserts that the trial court erred by not severing the charges at the defendant's trial. Because the Defendant failed to include any citations to the record or legal authority in support of his argument, we cannot address the merits of this issue and consider it waived. See Tenn. Ct. Crim. App. R. 10(b).

This Court requires that the Defendant on appeal present an argument, make appropriate references to the record, and cite relevant legal authority in support of his argument. See Tenn. Ct. Crim. App. R. 10(b).[4] Additionally, all Tennessee appellate courts require the appellant's brief to contain an argument, citations to authorities, and appropriate references to the record. See Tenn. R. App. P. 27(a)(7).[5] Failure to comply with these basic rules will ordinarily constitute a waiver of the issue. See Tenn. Ct. Crim. App. R. 10(b); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000).

In the present case, the Defendant's entire argument consists of a three-sentence conclusory statement asserting that the trial court erred by not severing the Defendant's charges at trial. The Defendant makes no reference to the record and cites no legal authority in support of his argument. If a motion for severance was made in the trial court, the Defendant has failed to cite to the record for the location of the motion. A severance issue is waived if a motion for a severance is not made. See Tenn. R. Crim. P. 14(a). Upon this record, we choose not to review this issue as presented and deem it waived.

IV. Evidentiary Issues

The Defendant raises two issues pertaining to the trial court's admission of evidence. First, the Defendant asserts the trial court erred in admitting statements about the Defendant's prior record made both by the court and the Defendant himself. Second, the Defendant claims the trial court

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[4] "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."

[5] "[The brief of the appellant shall contain] [a]n argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record(which may be quoted verbatim) relied on."

erred by admitting the Defendant's statement concerning his prior drug use, which he made at an earlier bond hearing. We find both issues waived.

The Defendant's appellate brief combines the two evidentiary issues, presenting one argument for both. Unfortunately, the "argument" consists of three brief sentences. Combined, the three sentences fail to state the contentions of the Defendant with respect to the issue presented and therefore fall short of constituting an argument as required by our rules of procedure. Additionally, no citations to any legal authority or references to the record were presented to support the claims of error. Accordingly, pursuant to Tennessee Court of Criminal Appeals Rule 10(b) and Tennessee Rule of Appellate Procedure 27(a)(7) we hold the Defendant has waived both issues.

V. Sentencing Issues.

The Defendant raises two issues with regard to sentencing. First, the Defendant argues the trial court erred by failing to apply proper weight to the mitigating factor of the Defendant's diminished mental capacity at sentencing. Second, the Defendant claims the trial court erred by ordering the Defendant's sentences to be served consecutively. Because the Defendant failed to prepare an adequate record on appeal pertaining to sentencing we are precluded from determining these issues on their merits.

When a party seeks appellate review he is charged with the "duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)); see also Tenn. R. App. P. 24(b).[6] It is well established that "an appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to the issue." State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990); see also Ballard, 855 S.W.2d at 560-61 (Tenn. 1993). Moreover, "the appellate court must conclusively presume that the ruling of the trial judge was correct, the evidence was sufficient to support the defendant's conviction, or the defendant received a fair and impartial trial." Draper, 800 S.W.2d at 493; see also State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Accordingly, an appellant's failure to include a complete transcript of the proceedings forming the basis of an appeal results in the waiver of any challenge to the lower court's ruling on the issue. See Ballard, S.W.2d at 560-61; Draper, 800 S.W.2d at 493.

It appears from the technical record that a sentencing hearing for the Defendant took place on August 19, 1999. Also submitted to this Court in the technical record is an order from Judge Walter Kurtz dated January 2, 2003, requiring the court clerk to "properly prepare" and give Defendant access to both "the trial and sentencing hearing transcripts." The Defendant did not include in the appellate record submitted to this Court the transcript of the sentencing hearing.

[6] "Rule 24. Content and Preparation of the Record. . . . (b) Transcript of Stenographic or Other Substantially Verbatim Recording of Evidence or Proceedings.-- If a stenographic report or other contemporaneously receded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn R. App. P. 24.

Because the Defendant failed to prepare an adequate record on appeal by omitting the sentencing hearing transcript, any claim of error pertaining to sentencing cannot be addressed by this Court. See State v. Adler, No. W2001-00951-CCA-R3-CD, 2002 WL 1482704, at *7, (Tenn. Crim. App., Jackson, Feb. 19, 2002) (holding that the defendant waived consideration of whether sentence was excessive by failing to provide the appellate court with a transcript of the sentencing hearing). Accordingly, we deem both issues raised in this appeal pertaining to the Defendant's sentencing to be waived.

Based on the foregoing analysis, we find that all issues raised on appeal are either without merit or have been waived. The judgments of the trial court are affirmed.

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DAVID H. WELLES, JUDGE